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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GIBBS INTERNATIONAL, INC.
f/k/a GIBBS TEXTILES, INC.,
Petitioner,

v.

INTERNAL REVENUE SERVICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

January 26, 1998

33 pp

QUESTION PRESENTED

I. Did the district court and the court of appeals err in refusing to order the IRS to disclose the documents at issue under the Freedom of Information Act (FOIA)?

A. Was the district court required to review de novo the IRS' claims that the documents at issue were exempt from disclosure under FOIA?

B. Did the district court fail to properly apply the correct standard of review to the IRS' refusal to disclose the documents at issue under FOIA?

PARTIES TO PROCEEDINGS

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that all of its stock is owned by one individual. Further, Petitioner states that it owns all of the stock of each of its subsidiaries.

Respondent is the Internal Revenue Service, an agency of the United States Government.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GIBBS INTERNATIONAL, INC.
f/k/a GIBBS TEXTILES, INC.,
Petitioner,

v.

INTERNAL REVENUE SERVICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Gibbs International, Inc. ("Gibbs") respectfully requests that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on November 7, 1997.

OPINIONS BELOW

The decision of the District Court granting summary judgment to the Government and the denial of the Motion for Reconsideration or Clarification, No. 7:96-996-13, were both unpublished and are included in the Appendix. See App. A-1; App. A-3. The decision of the Fourth Circuit, No. 96-2790, also was unpublished and is included in the Appendix. See App. A-4.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered a final judgment in this case on November 7, 1997. This Court is granted jurisdiction to review the judgment of the court of appeals by 28 U.S.C.A. § 1254(1). Pursuant to Rule 29.4(a), service of this Petition for Writ of Certiorari has been made on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave, N.W., Washington DC 20530.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C.A. § 552(a)(3) (West 1997):

> [E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in

> accordance with published rules ..., shall make the records promptly available to any person.

The Freedom of Information Act, 5 U.S.C.A. § 552(a)(4)(B) (West 1997):

> [In a claim brought for the production of records] the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of [the Freedom of Information Act] ....

The Freedom of Information Act, 5 U.S.C.A. § 552(b)(3) (West 1997):

> [FOIA] does not apply to matters that are ... specifically exempted from disclosure by statute (other than [5 U.S.C.A. § 552b]) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The Internal Revenue Code of 1986, as amended, 26 U.S.C.A. § 6103(e)(7) (West Supp. 1997):

> Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

STATEMENT OF THE CASE

This case involves a request for disclosure of information by the Internal Revenue Service (the "IRS") under the Freedom of Information Act, 5 U.S.C.A. § 552(a)(3) (West 1997) ("FOIA"). Specifically, the IRS maintains that Government records requested by Gibbs are exempt from disclosure pursuant to exemption three of FOIA, 5 U.S.C.A. § 552(b)(3), in conjunction with 26 U.S.C.A. § 6103(e)(7) (West Supp. 1997) ("section 6103"). See Affidavit of Stephen Flesner, App. A-7 to A-10 (the "Flesner Affidavit").

Statement of Facts

The IRS initiated a civil tax audit of Gibbs in February 1994, focusing on general tax and accounting issues involved in the taxpayer's business. The IRS also reviewed certain international transactions conducted between Gibbs and its wholly-owned German

subsidiary, Gibbs GmbH. At no time during the examination did the IRS make any adjustments for or otherwise raise allegations of fraud or illegal conduct by Gibbs.

On December 15, 1995, approximately one year and nine months after the IRS audit began, German Tax Officials conducted a raid and seized the business records of Gibbs GmbH. The German Tax Officials did not communicate with Gibbs or otherwise announce their intentions prior to raiding the facilities of Gibbs GmbH. The business records were taken without the consent or permission of either Gibbs or Gibbs GmbH, and no explanation was ever provided by the German Tax Officials for the seizure. Then--again without any explanation--the German Tax Officials returned the business records seized from Gibbs GmbH on February 26, 1996. The German Tax Officials did not take any additional records, explain what they were searching for, or otherwise communicate the purpose for the seizure. Shortly afterward, in March 1996, the IRS completed its audit and proposed certain adjustments to Gibbs' books and records.

As a result of this series of events, Gibbs became concerned that the IRS communicated confidential--and possibly false or inaccurate--tax information regarding Gibbs and Gibbs GmbH to German Tax Authorities. consequently, Gibbs filed a request under FOIA. The IRS denied the request, claiming that all pertinent records were exempt from disclosure based upon the provisions of a tax treaty between the United States and Germany. See J.A. 16-17. After the IRS denied the

request to disclose the documents, Gibbs instituted this action pursuant to 5 U.S.C.A. § 552(a)(4)(B) (West 1997) to enforce its rights under FOIA.

Statement of Procedural History

Before the district court, the IRS identified only five pages of documents that were responsive to Gibbs' request. Flesner Affidavit, App. A-7 to A-10. The IRS explained its justification for failing to disclose the responsive documents as follows:

> [T]he release of references to information provided to or requested from a tax treaty partner, which was compiled by the IRS with respect to the potential tax liability of [Gibbs], would chill the future cooperation of foreign governments and tax treaty partners. ... If treaty partners were to cease or limit their cooperation with respect to exchanges of information, so that information they provided would not exist in IRS files that might be subject to a FOIA request, the IRS would be severely hampered in its ... enforcement capabilities under the Internal Revenue Code. Consequently, disclosure ... of the documents provided to a foreign Competent Authority would seriously impair Federal tax administration.

Flesner Affidavit, App. A-9 to A-10. After reviewing the responsive documents in camera, the district court issued a short, written order granting summary judgment in favor of the IRS:

> After reviewing the documents submitted for in camera review as a result of oral arguments heard September 24, 1996, I conclude that the Internal Revenue Service did not act arbitrarily or in violation of law in refusing to release documents pursuant to the Freedom of Information Act, (FOIA). The documents refer to information exchanged pursuant to a tax treaty. The Internal Revenue Service reasonably concluded that the disclosure of the documents would chill future cooperation with foreign government treaty partners and that these documents fall within the FOIA exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(e)(7).

Order Granting Summary Judgment, App. A-1.

Following the later denial of Gibbs' Motion for Reconsideration, see App. A-3, Gibbs filed an appeal with the United States Court of Appeals for the Fourth Circuit. Judgment was entered against Gibbs by the Fourth Circuit on November 7, 1997 in an unpublished, per curiam opinion that found "no error in the district court's decision." App. A-6.

REASONS FOR GRANTING PETITION

The decision of the Fourth Circuit in this case conflicts with the decisions of the majority of circuit courts to have addressed the issue of the standard of review of claims of exemption from disclosure pursuant to 26 U.S.C.A. § 6103(e)(7), thus increasing the existing conflict among the circuits. Moreover, the decision issued by the court of appeals is erroneous and fails to properly evaluate the important relationship between FOIA and section 6103.

I. The Application of 26 U.S.C.A. § 6103(e)(7) by the Fourth Circuit is in Conflict with the Majority of Circuit Courts to have Considered this Issue.

The proper standard of review to be applied to IRS claims of exemption from FOIA under section 6103 has been addressed by a number of the courts of appeals. Seven of the circuit courts have determined that claims of exemption under section 6103 are subject to de novo review. Specifically, the Third, Fifth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have concluded that de novo review applies to the claim of exemption. See De Salvo v. Internal Revenue Service, 861 F.2d 1217, 1218-21 (10th Cir. 1988) (de novo review); Church of Scientology of Cal. v. Internal Revenue Service, 792 F.2d 146, 148-50 (D.C. Cir) (same), aff'd on a separate issue, 792 F.2d 153 (D.C. Cir. 1986) (en banc), aff'd 484 U.S. 9 (1987); Grasso v. Internal Revenue Service, 785 F.2d 70, 72-75 (3rd Cir. 1986) (same); Long v. United States, 742 F.2d

1173, 1177-78 (9th Cir. 1984) (same); Linsteadt v. Internal Revenue Service, 729 F.2d 998, 1001-03 (5th Cir. 1984) (same); Currie v. Internal Revenue Service, 704 F.2d 523, 526-28 (11th Cir. 1983) (same); Barney v. Internal Revenue Service, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980) ("inclined to agree" that de novo review applies).

In contrast, only the First, Sixth, and Seventh Circuits have indicated that the appropriate standard of review for claims of exemption under section 6103 is arbitrary and capricious. See Aronson v. Internal Revenue Service, 973 F.2d 962, 965-66 (1st Cir. 1992) ("[R]eview must take place under deferential, administrative law standards.") White v. Internal Revenue Service, 707 F.2d 897, 900 (6th Cir. 1983) ("disposed to affirm .. on the basis" that section 6103 is self-governing); King v. Internal Revenue Service, 688 F.2d 488, 495-96 (7th Cir. 1982) (arbitrary and capricious review). However, by allowing the decision of the district court to stand, the Fourth Circuit has now joined the circuits requiring arbitrary and capricious review.*

As a result of this split among the courts of appeals, the standard for reviewing claims of exemption under section 6103 differs widely from circuit to circuit. Thus, a claim of exemption by the IRS might be reversed by a circuit relying on de novo review, yet the identical claim for exemption might be accepted in a

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*Only the Second Circuit has failed to directly address this issue.

different circuit reviewing only for arbitrary and capricious behavior. Cf., e.g., Church of Scientology, 792 F.2d at 152-53 (circuit court, using de novo review, overruled decision of district court upholding exemption under arbitrary and capricious review). This unequal interpretation of the interaction between FOIA and section 6103 frustrates the expressed intent of Congress and impairs the broad--and uniform--application of FOIA.

II. The Decision of the Court of Appeals is Erroneous.

The court of appeals erred in affirming the decision of the district court because the district judge applied the arbitrary and capricious standard of review in upholding the IRS' refusal to disclose the information requested by Gibbs. See App. A-1 ("I conclude that the [IRS] did not act arbitrarily or in violation of law ....").
The framework of FOIA mandates de novo review of all claims of exemption from disclosure:

> [In a claim brought for the production of records] the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of [FOIA] ....

5 U.S.C.A. § 552(a)(4)(B) (emphasis added). One of these exemptions is 5 U.S.C.A. § 552(b)(3) ("exemption three"):

> [FOIA] does not apply to matters that are ... specifically exempted from disclosure by statute (other than [5 U.S.C.A. § 552b]) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Thus, claims of exemption based on statutes other than FOIA are subject to de novo review.

Section 6103 is precisely the type of statute contemplated by exemption three:

> Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

26 U.S.C.A § 6103(e)(7). That is, section 6103 refers to particular types of matters to be withheld from the public and establishes criteria to be used in evaluating the disclosure of such matters. See Long, 742 F.2d at

1178 ("Exemption 3 of FOIA was designed to give effect to just such explicit nondisclosure statutes as section 6103.") (footnote omitted). Consequently, claims of exemption under section 6103 must be reviewed de novo to determine whether the documents at issue may properly be withheld. See 5 U.S.C.A. § 552(a)(4)(B).

Some courts have concluded that section 6103 is a disclosure statute separate from FOIA. E.g., Aronson, 972 F.2d at 967. However, section 6103 is not a self-governing statute prescribing substantive and procedural rules governing the disclosure of IRS documents; rather, the statute narrowly focuses on exceptions from the prohibition of disclosure. See Church of Scientology of Cal., 792 F.2d at 149. Moreover, section 6103 contains no language indicating any intent to override FOIA, which would suggest a lack of intent to override the broad parameters of FOIA. In contrast, section 6110 of the Internal Revenue Code--which was enacted at the same time as section 6103 and is self-governing--states that its provisions are the "exclusive remedy" for the disclosure of IRS written determinations. 26 U.S.C.A. § 6110(l) (West Supp. 1997); see Church of Scientology of Cal., 792 F.2d at 148-50. In the absence of more explicit language, it is unreasonable to conclude that a narrow statute such as section 6103 overrules FOIA. See Church of Scientology of Cal., 792 F.2d at 149.

In this instance, the proper application of de novo review would have resulted in a rejection of the conclusory reasons given by the IRS for nondisclosure.

See Flesner Aff., App. A-8 to A-10. Because the affidavit merely asserts general principles of confidentiality and fails to demonstrate the particular reasons supporting a claim of exemption in this instance, it does not comply with this Court's precedent. See United States Dep't of Justice v. Landano, 508 U.S. 165, 174-78 (1993). If the district court had properly reviewed the affidavit de novo, it would have rejected the conclusory reasons proffered by the IRS and ordered disclosure of the documents at issue.

In sum, by affirming the decision of the district court, the court of appeals erroneously authorized arbitrary and capricious review of claims of exemption under section 6103. Based on the statutory language, the circuit court should have reversed the decision of the district court and ordered it to apply de novo review to the IRS claim of exemption.

III. The Question Presented is Important.

FOIA is an extremely important statute, designed to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). To advance this purpose, FOIA mandates "broad disclosure of Government records" unless an exemption from disclosure may validly be claimed by an agency. United States Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988) (internal quotation marks omitted). The Government has the

burden of justifying its claim of exemption from disclosure. 5 U.S.C.A § 552(a)(4)(B).

In light of the purposes of FOIA, the importance of de novo review is clear: without independent review of its decisions, an agency has no incentive to provide full disclosure of documents. This incentive is nowhere more important than in matters of taxation, where the authority of the IRS to review the private information of both individuals and corporations involves a tremendous potential for the arbitrary use of authority. If the incentive provided by de novo review is not present, there is an increased likelihood that the Government will act arbitrarily, confident that any wrongful actions will be shielded from view.

Finally, the issue of what standard of review applies to exemption three statutes has ramifications beyond the disclosure of tax documents. The courts have determined that many different laws qualify as an exemption three statute. See, e.g., Baldrige v. Shapiro, 455 U.S. 345 (1982) (13 U.S.C.A. §§ 8-9 (West 1990 & Supp. 1997)) (Census Act)); Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224 (1st Cir. 1994) (Fed. R. Crim. P. 6(e)) (grand jury); Virginia Sunshine Alliance v. Nuclear Regulatory Comm'n, 509 F.Supp. 863 (D. D.C.), aff'd 669 F.2d 788 (D.C. 1981) (42 U.S.C.A. § 2167 (West 1994)) (Atomic Energy Act of 1954, § 147). Thus, a determination that de novo review does not apply to claims of exemption under section 6103 will cause the adoption of erroneous standards of review in some courts in matters other than taxation, resulting in other circuit splits regarding the

standard of review. This will result in restriction of the broad disclosure requirements of FOIA and frustration of the Congressional intent embodied in the Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Erik P. Doerring
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Post Office Box 11390
Columbia, South Carolina 29211

Attorney for Petitioner

January 26, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

GIBBS INTERNATIONAL, INC., f/k/a Gibbs Textiles, Inc.,	)	
Plaintiff,	)	ORDER
vs.	)	C/A No. 7:96-996-13
INTERNAL REVENUE SERVICE,	)	
Defendant.	)	

After reviewing the documents submitted for *in camera* review as a result of oral arguments heard September 24, 1996, I conclude that the Internal Revenue Service did not act arbitrarily or in violation of law in refusing to release documents pursuant to the Freedom of Information Act, (FOIA). The documents refer to information exchanged pursuant to a tax treaty. The Internal Revenue Service reasonably concluded that the disclosure of the documents would chill future cooperation with foreign government treaty partners and that these documents fall within the FOIA Exemption 3, 5 U.S.C. § 552(b) (3), in conjunction with I.R.C. § 6103 (e)(7).

Accordingly, defendant's motion for summary judgment is granted. Plaintiff's cross-motion for summary judgment and motion to compel a *Vaughn* index is denied.

IT IS SO ORDERED.

G. Ross Anderson, Jr.
G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Anderson, South Carolina
October 7th, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

GIBBS INTERNATIONAL, INC., f/k/a Gibbs Textiles, Inc., Plaintiff,	)	ORDER
vs.	)	C/A No. 7:96-996-13
INTERNAL REVENUE SERVICE, Defendant.	)	

This matter came before the Court on November 20, 1996 for a hearing on the plaintiff's Motion for Reconsideration or Clarification. Upon review of the pleadings submitted by the parties and after hearing oral argument on the matters, this Court denies the motion.

THEREFORE, IT IS ORDERED that the plaintiff's Motion for Reconsideration or Clarification is denied.

IT IS SO ORDERED.

G. Ross Anderson, Jr.
G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Anderson, South Carolina
November 20, 1996

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GIBBS INTERNATIONAL, INCORPORATED,
formerly known as Gibbs Textiles,
Incorporated,

Plaintiff-Appellant,

No. 96-2790

v.

INTERNAL REVENUE,

Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge.

Argued: August 12, 1997

Decided: November 7, 1997

Before RUSSELL and HALL, Circuit Judges, and
MICHAEL, Senior United States District Judge for the
Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Erik P. Doerring, MCNAIR LAW FIRM, P.A., Columbia, South Carolina, for Appellant Teresa Thomas Milton, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Tracey C. Green, MCNAIR LAW FIRM, P.A., Columbia, South Carolina, for Appellant, Lorretta C. Argrett, Assistant Attorney General, Jonathan S. Cohen, J. Rene Josey, Jr., United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Gibbs International (Gibbs) appeals the district court's judgment in this case involving a Freedom of Information Act[2] (FOIA) request. Gibbs, the plaintiff, buys and sells used textile equipment on a world-wide basis. One of its wholly-owned subsidiaries is based in Germany. During the course of an audit of Gibbs, the Internal Revenue Service wrote German tax officials suggesting they participate in a simultaneous tax examination of Gibbs and its German subsidiary. After Gibbs learned of the IRS' letter, it requested the IRS to disclose the contents of the letter under the terms of FOIA. The IRS denied Gibbs' request, claiming the letter was exempt under the Freedom

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[2] 5 U.S.C.A. § 552 (West 1996 & Supp. 1997).

of Information Act.[3] Gibbs filed an administrative appeal with the IRS. The IRS failed to respond within 20 days, as required by law.[4]

Gibbs then filed suit in district court,[5] seeking disclosure of the letter and seeking to compel the IRS to produce a *Vaughn* index.[6] The district court examined the documents *in camera* and granted summary judgment in favor of the IRS. The district court denied Gibbs' request for reconsideration, however, and this appeal followed.

We have reviewed the record, the briefs and heard oral argument by the parties. We find no error in the district court's decision and therefore affirm its grant of summary judgment in favor of the IRS.

AFFIRMED

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[3] *See id.* § 552(a)(6)(C)(b) (West 1996) (exempting certain information).

[4] *See id.* § 552(a)(6)(A)(ii) (West 1996) requiring agency to respond within 20 days to FOIA request).

[5] *See id.* § 552(a)(6)(C) (West 1996) (providing that person has exhausted administrative remedies when agency fails to act on appeal within 20 days, and therefore is entitled to maintain action in district court).

[6] A *Vaughn* index is a description of each item withheld by the agency in response to a FOIA request. It must be sufficiently detailed that the district court can determine whether the material is exempt from disclosure under FOIA. *Ethyl Corp. v. United States Environmental Protection Agency*, 25 F.3d 1241, 12144 n.1 (4th Cir. 1994); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

GIBBS INTERNATIONAL, INC., f/k/a Gibbs Textiles, Inc.,	)	
Plaintiff,	)	
vs.	)	C/A No. 7:96-996-13
INTERNAL REVENUE SERVICE,	)	
Defendant.	)	

DECLARATION OF STEPHEN H. FLESNER

I, Stephen H. Flesner, pursuant to the provisions of 28 U.S.C. § 1746, state:

1. I am the Disclosure Officer of the Office of the Assistant Commissioner (International), Internal Revenue Service (IRS). I was promoted to this position in 1996, after having held the position of Assistant Disclosure Officer since 1992. I have been employed by the IRS in various capacities for approximately fourteen years.

2. Among my duties as Disclosure Officer is the determination pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as to whether to release documents regarding communications between the

Competent Authorities of the United States and countries with which the United States has income tax treaties or exchange-of-information agreements. Each party to a treaty or agreement designates a Competent Authority to act on behalf of and bind the party. The United States Competent Authority is the Assistant Commissioner (International). My determination regarding the confidentiality and disclosure of documents pertaining to communications between Competent Authorities includes information obtained or sought from foreign Competent Authorities under tax treaties or exchange-of-information agreements between the United States and foreign nations.

3. I have reviewed and am personally familiar with the responsive records in this case. The IRS asserts FOIA Exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(e)(7) as the basis for withholding in their entirety the following five pages, which were the only records responsive to the Plaintiff's January 18, 1996 FOIA request.

A. Page 1. This document is a cover letter from the Assistant Commissioner (International) to a foreign Competent Authority proposing a Simultaneous Examination of the Plaintiff and one of its foreign subsidiaries. The document evidences a decision by the United States Competent Authority to request the cooperation of a foreign Competent Authority, discloses to a foreign Competent Authority information respecting the Plaintiff, and solicits a foreign Competent Authority's views on the Proposal for Simultaneous Examination.

B. Pages 2-5. This document is a United States Simultaneous Examination Proposal. It evidences a decision by the United States Competent Authority to request the cooperation of a foreign Competent Authority, discloses to a foreign Competent Authority information on the Plaintiff and its foreign subsidiary, and suggests an exchange of documentation between the United States Competent Authority and a foreign Competent Authority.

4. I.R.C. § 6103(e)(7) provides that "return information with respect to any taxpayer may be open to inspection by or disclosure to any person . . . if the Secretary determines that such disclosure would not seriously impair Federal tax administration." It is the view of the United States Competent Authority that the release of references to information provided to or requested from a tax treaty partner, which was compiled by the IRS with respect to the potential tax liability of the Plaintiff, would chill the future cooperation of foreign governments and tax treaty partners. Documents and information provided by foreign governments and tax treaty partners are often essential elements in civil examination or criminal tax investigations with respect to the determination of liability under the Internal Revenue Code. If treaty partners were to cease or limit their cooperation with respect to exchanges of information, so that information they provided would not exist in IRS files that might be subject to a FOIA request, the IRS would be severely hampered in its civil examinations, criminal investigations, and ultimate enforcement capabilities under the Internal Revenue Code. Consequently, disclosure pursuant to the Plaintiff's FOIA request of the

documents provided to a foreign Competent Authority would seriously impair Federal tax administration.

6. I have, therefore, made the determination, pursuant to the authority delegated to the Assistant Commissioner (International) by the Commissioner of Internal Revenue in Delegation Order No. 156 (Rev. 34), paragraph 1(b) (attached) and to me by the Assistant Commissioner (International) in International Delegation Order No. 36 (attached), that disclosure of the documents discussed above in Paragraph 3 would seriously impair Federal tax administration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of May, 1996.

Stephen H. Flesner
STEPHEN H. FLESNER
Disclosure Officer
Office of Assistant Commissioner
(International)
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Supreme Court, U.S.
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(2)

No. 97-1244

In the Supreme Court of the United States

OCTOBER TERM, 1997

GIBBS INTERNATIONAL, INC.
F/K/A GIBBS TEXTILES, INC., PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the documents sought by petitioner under the Freedom of Information Act were properly withheld because "such disclosure would * * * seriously impair Federal tax administration" (26 U.S.C. 6103(e)(7)).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A4-A6) and the opinion of the district court (Pet. App. A1-A2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1997. The petition for certiorari was filed on January 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of 5 U.S.C. 552 and 26 U.S.C. 6103 are set forth in the petition (Pet. 2-4).

STATEMENT

1. Petitioner buys and sells textile machinery and is the sole shareholder of a German corporation named Gibbs GmbH. The latter corporation acts as agent for petitioner and also conducts business on its own account. On December 15, 1995, the German tax authority seized certain business records of Gibbs GmbH. Those records were returned by the German tax authority on February 26, 1996 (Pet. 5; see also Pet. App. A5).

On January 18, 1996, petitioner filed a Freedom of Information Act request with the Internal Revenue Service seeking records of communications between the IRS and the German tax authority concerning petitioner or its subsidiaries. In response to that request, the IRS identified two documents: (i) a one-page "cover letter from the Assistant Commissioner (International) to a foreign Competent Authority proposing a Simultaneous Examination of [petitioner] and one of its foreign subsidiaries" and (ii) the four-page Simultaneous Examination Proposal (Pet. App. A7-A9).*

The IRS declined to disclose the responsive documents. Exemption 3 of the Freedom of Information

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* The United States and Germany are parties to the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes, Aug. 29, 1989, S. Treaty Doc. No. 101-10 (1990). The term "Competent Authority" refers to the entity that is authorized to act on behalf of each party to the treaty. The Competent Authority for the United States under this treaty is the Assistant Commissioner (International) of Internal Revenue. See I.R.S. Deleg. Order No. 114 (Rev. 9), 1990-2 C.B. 326.

Act exempts from disclosure any document that is protected from disclosure by other statutes. 5 U.S.C. 552(b)(3). Section 6103(a) of the Internal Revenue Code bars the disclosure of tax "return information" (26 U.S.C. 6103(a)) even to the taxpayer unless the Secretary of the Treasury "determines that such disclosure would not seriously impair Federal tax administration." 26 U.S.C. 6103(e)(7). Because the requested information was "return information" (as that term is broadly defined in Section 6103(b)(2), and because the agency "concluded that the disclosure of the documents would chill future cooperation with foreign government treaty partners" (Pet. App. A1) and thereby "impair Federal tax administration" (26 U.S.C. 6103(e)(7)), the agency withheld the documents.

2. a. Petitioner brought this suit to compel the agency to produce the requested documents. The IRS filed an affidavit that explained that release of the documents sought by petitioner "would chill the future cooperation of foreign governments and tax treaty partners" and would thereby "severely hamper[]" enforcement of the tax laws and "seriously impair Federal tax administration" (Pet. 6). After reviewing the requested documents *in camera*, the district court concluded that the agency had "reasonably" determined that disclosure would chill future cooperation with foreign government treaty partners (Pet. App. A1). The court therefore agreed with the agency that the documents are barred from disclosure under 26 U.S.C. 6103(e)(7).

b. The court of appeals affirmed in a brief *per curiam* opinion (Pet. App. A5-A6). After reviewing the documents *in camera*, the court of appeals con-

cluded simply that there was "no error in the district court's decision" (*id.* at A6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The Freedom of Information Act "expressly recognizes * * * that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Baldrige* v. *Shapiro*, 455 U.S. 345, 352 (1982). Exemption 3 allows an agency to withhold information if another statute prohibits disclosure either by application of "particular criteria for withholding" or by reference "to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)).

Section 6103 of the Internal Revenue Code is a nondisclosure statute within the meaning of Exemption 3. *Tax Analysts* v. *IRS*, 117 F.3d 607, 611 (D.C. Cir. 1997); *Aronson* v. *IRS*, 973 F.2d 962, 964 (1st Cir. 1992); *DeSalvo* v. *IRS*, 861 F.2d 1217, 1221 n.4 (10th Cir. 1988); *Chamberlain* v. *Kurtz*, 589 F.2d 827, 838-839 (5th Cir.), cert. denied, 444 U.S. 842 (1979). Section 6103 provides generally that tax "[r]eturns and return information shall be confidential" and are not to be disclosed except as specifically authorized under the Internal Revenue Code. 26 U.S.C. 6103(a). Even when a taxpayer seeks a copy of its own tax "return information," Section 6103(e)(7) authorizes disclosure only if "the Secretary determines that such disclosure would not seriously impair Federal tax admini

stration." 26 U.S.C. 6103(e)(7). The term "tax administration" is defined for this purpose to include "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party." 26 U.S.C. 6103(b)(4)(A)(i).

b. It is undisputed that the records withheld in this case constitute "return information." Those records therefore may be disclosed only if "the Secretary determines that such disclosure would not seriously impair Federal tax administration" (26 U.S.C. 6103(e)(7)). In a judicial challenge to an agency's withholding decision, moreover, the Freedom of Information Act provides that "the court shall determine the matter de novo." 5 U.S.C. 552(a)(4)(B). Petitioner asserts that the district court failed to conduct a *de novo* review of the agency's determination to withhold the records and instead "applied the arbitrary and capricious standard of review in upholding the IRS' refusal to disclose the information" (Pet. 10).

That contention is simply inconsistent with the record of this case. The affidavit filed by the agency in this case stated that disclosure of the requested documents would interfere with cooperation between the United States and its treaty partner and would therefore impair federal tax administration. The district court nonetheless concluded that it was required to "examine those documents *in camera* and * * * make a *de novo* determination" of the merits of the asserted exemption (C.A. App. 113). After conducting that *in camera* review, the court determined that the agency had "reasonably concluded" that disclosure of the documents "would chill future coopera-

tion with foreign government treaty partners" (Pet. App. A1).

The district court expressly provided petitioner with the *de novo* review that the statute requires. The district court evaluated for itself—through an *in camera* inspection—whether the stated basis for withholding the documents was adequate to justify their nondisclosure. That *de novo* review of the decision to withhold the documents is precisely what the Freedom of Information Act commands.

2. a. Petitioner contends that "the standard for reviewing claims of exemption under section 6103 differs widely from circuit to circuit" (Pet. 9, 10). Petitioner asserts that some circuits engage in a *de novo* review of claims of exemption for "return information" arising under Section 6103 while others review only whether the Secretary has acted in an arbitrary and capricious manner. That asserted conflict does not merit review by this Court in this case for several reasons: (i) the IRS conceded in the courts below that the district court is to conduct a *de novo* review of the agency's determination (C.A. App. 110 ("the standard of review under a FOIA case is a *de novo* standard of review")); (ii) the district court expressly applied a *de novo* standard of review (*id.* at 113 ("I've got to make a *de novo* determination")); and (iii) the court of appeals (which also engaged in an *in camera* inspection of the documents) did not address the question of the appropriate standard of review in affirming the decision of the district court.

b. Although the IRS has not disputed in this case that the Freedom of Information Act authorizes a *de novo* review of the determination to withhold documents under Section 6103, the agency has contended that when its decision to withhold records is based on

unique knowledge of the needs of "federal tax administration" (26 U.S.C. 6103(e)(7)) it is appropriate for courts to give due weight in their analysis to the agency's reasoning. Even the cases on which petitioner relies have agreed with the agency on that issue. See, *e.g.*, *Linsteadt* v. *IRS*, 729 F.2d 998, 1005 (5th Cir. 1984) (IRS affidavits "must be given due weight despite our holding that an abuse of discretion standard does not apply"); *Long* v. *IRS*, 742 F.2d 1173, 1182 (9th Cir. 1984) (by holding *de novo* standard of review applicable, "[w]e * * * do not mean to imply that the Commissioner's determination is to count for nothing").

c. Moreover, under any standard of review, it is apparent that the result reached in this case would be the same. After the district court viewed the disputed documents *in camera*, the court found that the determination that disclosure would interfere with tax administration was "reasonabl[e]," was not "arbitrar[y]" and was not "in violation of law" (Pet. App. A1). In agreeing with those conclusions, the court of appeals did not find it necessary even to address which of the alternative standards of review governs in this case (*id.* at A6). Further review of the decision in this case is thus not warranted for the additional reason that a judgment of this Court on the question that petitioner raises would not alter the ultimate disposition of the controversy. As the Court has emphasized, it sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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